IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 278

MURRAY R. SPIES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

DAVID V. CAHILL,
Counsel for Petitioner.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully submits the following reply to the brief of the United States in opposition:

1.

The statement of the question presented as given in the Government's opposing brief is not accurate or complete.

Possibly the point as stated in the petition was not fully understood, although it has been clearly stated. The primary question is one of statutory construction and has been treated as such by the judges who have passed upon this point in the Second and Seventh Circuits in the case at bar and two other cases:

O'Brien v. *United States*, 51 Fed. (2nd) 193, 198.
United States v. *Miro*, 60 Fed. (2nd) 58.

In his dissenting opinion in the *O'Brien* case Judge Alschuler made this unmistakably clear and Judge Learned Hand in the case at bar expressed the opinion that the logic of that dissenting opinion was unanswerable.

Counsel for the Government in their opposing brief stated the question as one presenting only the sufficiency of the indictment. That question was raised at the opening of the trial, but in the petition filed herein, in the Appellate Court below and in the trial court emphasis was laid upon the insufficiency of the evidence, and that question rested upon the question of statutory construction discussed in the *O'Brien* case, the *Miro* case and in the case at bar, and never settled by this Court. To state again this question, which goes beyond the sufficiency of the indictment and to the heart of the case, it is this, whether the two misdemeanors defined in Section 145(a) of the Revenue Act, of themselves and without the addition of any other element, constitute the felony defined by Congress in Section 145(b). Even if it were held that the indictment was sufficient, the question here presented would remain undecided, and the differences of opinion between the various judges who have passed upon the question of stattuory construction in the Second and Seventh Circuits, would remain unsettled.

It is not helpful or pertinent, therefore, to discuss the cases cited by counsel for the Government in support of the indictment.

It is equally beside the point to cite the *O'Brien* and *Miro* cases as settling the question of statutory construction. Petitioner is asking that the very doubt created by those decisions be resolved by this Court.

With respect to the secondary question, presented briefly in our petition, the excerpts, quoted by opposing counsel from the trial court's instructions, demonstrate that there was no clear or specific statement of the tests by which the jury might determine whether any physical or mental condition of petitioner found by them would negative the alle-

gation and attempted proof of willfulness on the part of petitioner. The instructions dealt only with general principles and left untouched the only matter of practical importance, that is, the application of those principles to the concrete case.

It is respectfully urged that the question whether the indictment was sufficient is merely incidental and presents only one phase of the question of statutory construction presented to the court by the petitioner. Even though the indictment may possibly have been sufficient, the proof of the crime was not sufficient if the reasoning and conclusion of Judges Alschuler and Learned Hand are correct, that is, that the misdemeanors defined in subdivision (a) of Section 145 of themselves do not constitute the felony defined in Section 145(b).

Respectfully submitted,

DAVID V. CAHILL,
Counsel for Petitioner.